Supreme Court, U.S.
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No. 98-

IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

AETNA FINANCE COMPANY,
D.B.A. ITT FINANCIAL SERVICES,

Petitioner,

v.

MILDRED WILLIAMS,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Ohio

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a state court's adoption of a *per se* rule against enforcement of arbitration provisions contained in mortgage loan agreements and other standardized "form" contracts violates the Federal Arbitration Act, 9 U.S.C. §§ 1 *et seq*.

2. Whether the punitive damages award in this case is unconstitutionally excessive.

PARTIES INVOLVED AND RULE 29.6 STATEMENT

All parties to the case are listed in the caption. In December 1995, petitioner Aetna Finance Company was merged into Computer & Equipment Leasing Corporation, which is its successor as a result of the merger. Computer & Equipment Leasing Corporation has no subsidiaries. Its parent corporation is ITT Industries, Inc.

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On Petition For A Writ Of Certiorari
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PETITION FOR A WRIT OF CERTIORARI

Petitioner Aetna Finance Company d.b.a. ITT Financial Services ("ITT" or "petitioner") respectfully petitions this Court for a writ of certiorari to review a decision of the Supreme Court of Ohio.

OPINIONS BELOW

The opinion of the Supreme Court of Ohio (App., *infra*, 1a-30a) is reported at 83 Ohio St. 3d 464, 700 N.E.2d 859. The opinion of the Court of Appeals of Ohio (App., *infra*, 31a-68a) is not reported. A prior opinion of the Supreme Court of Ohio (App., *infra*, 69a-74a) is reported at 65 Ohio St. 3d 1203, 602 N.E.2d 246. A prior order of the Court of Appeals of Ohio (App., *infra*, 75a) is not reported.

JURISDICTION

The judgment of the Supreme Court of Ohio was entered on November 4, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS AND STATUTE INVOLVED

1. The Supremacy Clause, U.S. Const. art. VI, cl. 2, provides in pertinent part:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

2. The Due Process Clause, U.S. Const. amend. XIV, § 1, provides in pertinent part:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law.

3. Section 2 of the Federal Arbitration Act, 9 U.S.C. § 2, provides in pertinent part:

> § 2. Validity, irrevocability, and enforcement of agreements to arbitrate.
>
> A written provision in any . . . contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

STATEMENT

After the trial court refused to enforce a contractual arbitration provision, the jury awarded $15,000 in compensatory damages and $1.5 million in punitive damages against petitioner. The Ohio Court of Appeals and Supreme Court affirmed. App., *infra*, 31a-68a; 1a-30a.

1. Respondent contracted with one Christopher Blair to have certain work done on the interior and exterior of her

house. App., *infra*, 2a. To pay for that work, and to retire some other debts, respondent borrowed approximately $13,000 from ITT. *Id.* at 3a. The loan was secured by respondent's house and had a term of fifteen years. *Id.* Respondent used most of the loan proceeds to pay Blair for the home repairs, which were not performed to her satisfaction. *Id.* at 4a.

Respondent made only two payments on the loan. App., *infra*, 4a. Shortly after she stopped making payments, respondent sued ITT, claiming that ITT had conspired with Blair to fraudulently induce respondent to borrow money to pay for work that would not be completed satisfactorily. *Id.* Respondent did not sue Blair; in fact, Blair testified at trial as a witness for respondent. *Id.* at 34a.

2. The loan agreement that respondent signed "contained a broad arbitration clause" (App. *infra*, 35a) that stated, in bold print, that "*any dispute*, past, present, or future, between us or claim by either against the other or any agent or affiliate of the other, whether related to your loan, products you purchase through ITT Financial Services, or otherwise, *shall be resolved by binding arbitration* in accordance with the arbitration rules of the National Arbitration Forum." *See id.* at 25a-26a (emphasis added).

a. Immediately after respondent filed suit, ITT moved to compel arbitration pursuant to the contractual arbitration provision. App., *infra*, 4a. Respondent opposed that motion on the ground that the arbitration provision was unconscionable. *Id.* The trial court denied ITT's motion to compel arbitration without giving any reason for the denial. *Id.*; *see also id.* at 34a-35a ("The trial court did not deny arbitration because the arbitration clause was unconscionable or invalid, or because the contract was unconscionable or invalid—it merely denied arbitration, with no reasons attached").

ITT appealed the trial court's refusal to order arbitration, and the court of appeals affirmed on the ground that the complaint "challenges the existence of a contract between the parties and, therefore, the arbitration clause in the loan

agreement may not be enforced until the question of the existence of the contract is resolved." *Id.* at 75a. The state supreme court allowed a discretionary appeal, which was subsequently dismissed as improvident. *Id.* at 69a. Two dissenting justices pointed out that the court of appeals' decision was wrong, because "when there is an enforceable arbitration provision, questions regarding the validity of the contract are to be decided by an arbitrator." *Id.* at 72a (citing *Prima Paint Corp.* v. *Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 (1967)). Those justices construed the court's disposition of the appeal "to require that the trial court first consider the narrow issue of whether the agreement to arbitrate is valid," because "[t]hat is the result required by the Federal Arbitration Act." *Id.* at 71a.

b. On remand, ITT requested an evidentiary hearing on the enforceability of the arbitration provision. That motion was denied, again without explanation. The case then proceeded to trial, where the jury awarded $15,000 in compensatory damages and $1.5 million in punitive damages against petitioner.

On appeal from the jury's verdict, the court of appeals noted that "[t]he trial court never resolved the issue of whether the arbitration clause was valid, or whether the contract existed." App., *infra*, 36a. Rather, "the trial judge simply ordered the case to proceed to trial, erroneously assuming that his original decision, whatever it was, had been 'upheld,' and that the issue of arbitration was somehow no longer viable." *Id.*

Nevertheless, the court of appeals affirmed the trial court's refusal even to inquire into the arbitrability of the dispute on the ground that, since the trial had already been held, "[s]tarting over in arbitration would be a colossal waste of resources." App., *infra*, 37a. The court also said that because "[a]rbitration is merely a substitution for litigation," ITT was not prejudiced because "ITT got the 'real thing.'" *Id.*

c. Although the Supreme Court of Ohio recognized that its precedents, "as well as the directives of the United States

Supreme Court, call into question some of the conclusions reached by the court of appeals regarding the enforceability of the arbitration provision at issue" (*id.* at 11a), it held by a 4-to-3 margin that the arbitration clause was unenforceable.

The four-justice majority said that this arbitration clause, "contained in a consumer credit agreement with some aspects of an adhesion contract, necessarily engenders more reservations than an arbitration clause in a different setting, such as in a collective bargaining agreement, a commercial contract between two businesses, or a brokerage agreement." App., *infra*, 12a. The court also cited the "evidence regarding the conspiracy between ITT and Blair as the fundamental reason for [respondent's] entering into the loan agreement in the first place" as "further support for the invalidity of the arbitration clause." *Id.*

Relying on *Patterson* v. *ITT Consumer Financial Corp.*, 14 Cal. App. 4th 1659 (1993), *cert. denied*, 510 U.S. 1176 (1994), in which a California court refused to enforce a similar arbitration clause, the majority held that the contractual arbitration clause was unenforceable as a matter of law:

> [W]e determine that the trial court's decision denying ITT's motion to compel arbitration was tantamount to a finding that the agreement to arbitrate was invalid, and further that the arbitration provision was unconscionable. We determine that any presumption in favor of arbitration . . . should be substantially weaker in a case such as this, when there are strong indications that the contract at issue is an adhesion contract, and the arbitration clause itself appears to be adhesive in nature. In this situation, there arises considerable doubt that any true agreement ever existed to submit disputes to arbitration.

App., *infra*, 13a.

The three dissenting justices disagreed with the majority's analysis of the arbitration issue. As they observed, "[u]ntil today's decision, no court has found the

arbitration clause between ITT and [respondent] to be unconscionable." App., *infra*, 23a. The dissenters also noted that the majority's holding was not in any way limited to the particular facts of this case, but rather applied to all cases involving standardized contracts containing arbitration provisions. *Id.* at 25a (noting that the record demonstrated that respondent read the contract and understood its basic terms before signing it). Thus, the dissenters argued, the majority, in relying on *Patterson*, placed too much emphasis on the disparity of bargaining power and the costs of arbitration: "These factors, . . . if by themselves deemed to render arbitration provisions of a contract unconscionable, could potentially invalidate a large percentage of arbitration agreements in consumer transactions." *Id.* at 24a. The dissenting justices recognized that "the breadth of today's decision" could "work[] toward the wholesale invalidation of arbitration clauses in consumer transactions." *Id.* at 27a.

3. ITT also challenged the $1.5 million punitive damages award as unconstitutionally excessive. Although the state supreme court purported to follow this Court's decision in *BMW* v. *Gore*, 517 U.S. 559 (1996), its analysis of the *BMW* factors was cursory: "[T]here is ample evidence in the record that ITT engaged in wrongful conduct sufficient to merit an award of punitive damages. . . . Because the jury found ITT's conduct to be sufficiently reprehensible, consideration of the first guidepost of *BMW* yields the conclusion that due process was not violated in this case. Likewise, consideration of the other two guideposts also results in the conclusion that due process was not violated." App., *infra*, 22a.

REASONS FOR GRANTING THE PETITION

The Ohio Supreme Court has created a sweeping and unprecedented exception to the enforceability of contractual arbitration provisions mandated by the Federal Arbitration Act (FAA). The decision below declares unenforceable all arbitration provisions contained in mortgage loan agreements or other standardized "form" contracts, and effectively adopts a presumption that all such arbitration agreements are

unconscionable as a matter of state law. This manifest hostility toward arbitration is contrary to the strong federal policy in favor of arbitration established by the FAA and this Court's precedents. It also conflicts directly with decisions in numerous other jurisdictions that have applied the federally mandated presumption of arbitrability to enforce arbitration provisions in consumer credit agreements and other form contracts. This Court's review is necessary to preserve the important federal policy embodied in the FAA, to protect the viability of millions of arbitration agreements threatened by the decision below, and to resolve the numerous conflicts between the decision below and established precedents of this Court and other state and federal courts.

The Ohio Supreme Court also disregarded this Court's decision in *BMW* v. *Gore*, 517 U.S. 559 (1996). In direct conflict with the due process protections established in *BMW*, the court below upheld a punitive damages award one hundred times larger than the award of actual damages despite the trial court's complete failure to consider the degree of reprehensibility of respondent's conduct, the ratio between punitive and compensatory damages, and the existence of other available sanctions for the conduct. Unfortunately, the decision below is symptomatic of the way in which some lower courts have routinely disregarded the *BMW* standards. This Court's review is warranted to ensure that the principles announced in *BMW* continue to have meaningful effect.

I. The Decision Below Directly Conflicts With The Federal Arbitration Act And With Many Decisions Of This Court And Other Federal And State Courts

The Federal Arbitration Act expressly provides that all arbitration agreements in "contract[s] evidencing a transaction involving commerce ... shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. The court below entirely disregarded this

important principle of federal law. The Ohio Supreme Court erroneously reversed the federally mandated presumption of arbitrability for all arbitration agreements contained in mortgage loan agreements and other form contracts, unlawfully singled out arbitration provisions for adverse treatment, and impermissibly relied on generalized assertions regarding the "unreasonableness" of arbitration without any showing that the individual would be denied access to a fair hearing. As a result, the decision below undermines the important federal policies embodied in the FAA and places in jeopardy millions of arbitration agreements throughout the country. *See* App., *infra*, 27a (dissenting opinion) (decision below could "work[] toward the wholesale invalidation of arbitration clauses in consumer transactions"); *id.* at 24a (decision "could potentially invalidate a large percentage of arbitration agreements in consumer contracts").

A. The Decision Below Turns The Presumption Of Arbitrability On Its Head For All Arbitration Provisions Contained In Consumer Credit Agreements And Other Form Contracts

The Ohio Supreme Court created a blanket exception to the FAA's presumption of arbitrability for all arbitration clauses "contained in a consumer credit agreement with some aspects of an adhesion contract." App., *infra*, 12a-13a. Indeed, the court below not only created a sweeping new exception to the FAA's presumption of arbitrability, but adopted the opposite presumption—at least for all arbitration provisions contained in what it characterized as "adhesive" form contracts—*that arbitration provisions are presumed unconscionable*. *Id.* at 12a. The court cited no decision of this or any other court in support of its broad and newfound exception. Nor could it, since the exception is directly contrary to this Court's established precedent, as well as that of every other jurisdiction to have addressed the issue.

1. Neither the FAA nor this Court's case law allows for the exception recognized by the court below. Rather, as this Court has made clear, Congress enacted the FAA to reverse the long-standing judicial hostility toward arbitration

agreements that American courts had adopted from the English common law. *Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991); *Dean Witter Reynolds, Inc.* v. *Byrd*, 470 U.S. 213, 219-20 & n.6 (1985). The Act "embodies a clear federal policy of requiring arbitration unless the agreement to arbitrate is not part of a contract evidencing interstate commerce or is revocable 'upon such grounds as exist at law or in equity for the revocation of any contract.'" *Perry* v. *Thomas*, 482 U.S. 483, 489 (1987). "Section 2 [of the FAA] is a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary." *Moses H. Cone Memorial Hospital* v. *Mecury Construction Corp.*, 460 U.S. 1, 24 (1983). As a result, state rules or policies antagonistic to arbitration are preempted by the FAA pursuant to the Supremacy Clause. *Southland Corp.* v. *Keating*, 465 U.S. 1, 16 (1984) ("In creating a substantive rule applicable in state as well as federal courts, Congress intended to foreclose state . . . attempts to undercut the enforceability of arbitration agreements").

By attempting to exempt from the FAA's favorable presumption all arbitration agreements contained in standardized form contracts, the decision below is nothing other than an illegitimate attempt to rewrite this important federal statute. The Ohio Supreme Court purported to justify its wholesale abandonment of the federal presumption of arbitrability solely on the ground of an assumed inequality of bargaining power between the parties of most form contracts—a rationale that this Court repeatedly has *rejected* as a basis for avoiding an otherwise binding arbitration agreement. "Mere inequality in bargaining power," this Court declared in *Gilmer*, "is *not* a sufficient reason to hold that arbitration agreements are never enforceable in the employment context." 500 U.S. at 33 (emphasis added).

Similarly, in *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985), the Court flatly rejected the notion that "the strong possibility that contracts which generate antitrust disputes may be contracts of adhesion

militates against automatic forum determination by contract." According to the Court, such a sweeping generalization was "unwarranted" because "[t]he mere appearance of an antitrust dispute [involving an adhesion contract] does not alone warrant invalidation of the selected forum on the undemonstrated assumption that the arbitration clause is tainted." *Id.* Yet this same "undemonstrated assumption" is the sole basis for the decision below.

In addition, the Ohio Supreme Court's statement that "[t]he trial court was entitled initially to view the arbitration clause at issue with some skepticism" because of its "adhesive" nature (App., *infra*, 12a) is directly inconsistent with this Court's declaration that doubts about enforceability "should be resolved in favor of arbitration"—"whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability." *Moses H. Cone*, 460 U.S. at 24-25. Notably, the court below made no finding that respondent was in any way misled or surprised by the inclusion of the arbitration provision. Nor could it, since, as the dissent noted, it was essentially undisputed that respondent read the contract before signing it and understood the basic terms of the agreement. App., *infra*, 25a.

Moreover, this Court routinely has applied the FAA and its presumption of arbitrability to standardized "form" contracts. *See, e.g., Doctor's Associates, Inc.* v. *Casarotto*, 517 U.S. 681 (1996) (form franchise agreement); *Allied-Bruce Terminix Cos.* v. *Dobson*, 513 U.S. 265 (1995) (standardized termite prevention contract); *Mastrobuono* v. *Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995) (standardized contract between securities broker and its customers); *Vimar Seguros y Reaseguros, S.A.* v. *M/V Sky Reefer*, 515 U.S. 528 (1995) (standardized maritime bill of lading agreement); *Perry* v. *Thomas*, 482 U.S. 483 (1987) (standardized contract between securities broker and its employees); *Mitsubishi*, 473 U.S. 614 (standardized franchise agreement between automobile manufacturer and dealers). *Cf. Carnival Cruise Lines, Inc.* v. *Shute*, 499 U.S.

585, 595 (1991) (enforcing nonnegotiated forum-selection provision on back of preprinted passenger cruise ticket).

The creation of a blanket exception from the presumption in favor of arbitration for form or "adhesive" contracts thus cannot be reconciled with this Court's precedents. Given the prevalence of standardized form contracts in our modern economy, an exception for such contracts would eviscerate the FAA of much of its intended impact. Because the Ohio Supreme Court's sweeping decision in this case creates just such an exception, and thereby undermines the important federal policy favoring arbitration expressed in the FAA, this Court's review is essential.

2. The decision below not only is irreconcilable with this Court's decisions, but directly conflicts with the decisions of many other federal and state courts. The Ohio Supreme Court's refusal to enforce the arbitration provision because "there are strong indications that the contract at issue is an adhesion contract" (App. *infra*, 13a) is flatly inconsistent with the established rule that "state law adhesion principles may *not* be invoked to bar arbitrability of disputes under the [FAA]." *Mago* v. *Shearson Lehman Hutton Inc.*, 956 F.2d 932, 934 (9th Cir. 1992) (emphasis added, citation omitted); *see also Bayma* v. *Smith Barney, Harris Upham & Co.*, 784 F.2d 1023 (9th Cir. 1986); *Hall* v. *Prudential-Bache Securities, Inc.*, 662 F. Supp. 468, 470 (C.D. Cal. 1987). It is also in direct conflict with the decisions of several courts that so-called adhesion principles alone are not sufficient to overcome the presumption in favor of arbitration. *See, e.g., Buraczynski* v. *Eyring*, 919 S.W.2d 314, 320-21 (Tenn. 1996) ("Our conclusion that the [physician-patient] contracts were contracts of adhesion is not, however, determinative of the contracts' enforceability"); *Allgor* v. *Travelers Insurance Co.*, 654 A.2d 1375, 1378-79 (N.J. App. Div. 1995) ("Arbitration being a legislatively and judicially acknowledged and encouraged forum for the resolution of disputes, we perceive no violation of public policy simply because that election is contained in a contract of adhesion").

In sharp contrast to the decision below, courts routinely have applied the FAA's presumption to form contracts, including consumer credit agreements. *See, e.g., The Andersons, Inc.* v. *Horton Farms, Inc.*, __ F.3d __, 1998 WL 879662 (6th Cir. Dec. 17, 1998) (grain delivery contracts); *Seus* v. *John Nuveen & Co.*, 146 F.3d 175, 184 (3d Cir.) (standardized brokerage employment contract), *petition for cert. filed,* 67 U.S.L.W. 3323 (U.S. Oct. 19, 1998) (No. 98-719); *Hill* v. *Gateway 2000, Inc.*, 105 F.3d 1147 (7th Cir.) (form contract shipped with mail-order computer and made effective unless the product was returned within 30 days), *cert. denied*, 118 S. Ct. 47 (1997); *Securities Industry Association* v. *Connolly*, 883 F.2d 1114 (1st Cir. 1989) (standardized contract between securities broker and its customers); *Rollins, Inc.* v. *Foster*, 991 F. Supp. 1426 (M.D. Ala. 1998) (form contract for insect extermination); *Goodwin* v. *Ford Motor Credit Co.*, 970 F. Supp. 1007, 1014-15 (M.D. Ala. 1997) (standardized car loan agreements); *McCarthy* v. *Providential Corp.*, 1994 WL 387852 (N.D. Cal. July 19, 1994) (reverse mortgage loans for senior citizens); *Lackey* v. *Green Tree Financial Corp.*, 498 S.E.2d 898, 902-05 (S.C. App. 1998) (mobile home retail installment contracts); *Brown* v. *KFC National Management Co.*, 921 P.2d 146, 167 (Haw. 1996) (form employment contract); *Passage* v. *Prudential-Bache Securities, Inc.*, 727 P.2d 1298, 1301 (Mont. 1986) (brokerage agreements).

The decision below is also unambiguously inconsonant with other federal and state decisions in which the courts conspicuously have applied the FAA and its presumption in favor of arbitration to the *identical* arbitration provision involved in this case. *See, e.g., DiCrisci* v. *Lyndon Guaranty Bank of New York*, 807 F. Supp. 947, 950-51 (W.D.N.Y. 1992); *ITT Consumer Financial Corp.* v. *McNaughton*, 8 I.E.R. Cases (BNA) 808, 1991 WL 519584 (N.D. Ala. Apr. 12, 1991).

Moreover, many courts have expressly rejected the argument that arbitration agreements lose their presumption of enforceability merely because they are included in a form contract or because the parties had unequal bargaining

power. *See, e.g., Seus*, 146 F.3d at 184 ("[E]ven if we were to assume *arguendo* that the [arbitration agreement] is a contract of adhesion, it would not be unenforceable. A contract of adhesion is invalid only where its terms unreasonably favor the other party."); *Great Western Mortgage Corp.* v. *Peacock*, 110 F.3d 222, 229 (3d Cir.) ("[M]ore than a disparity in bargaining power is needed in order to show that an arbitration agreement was not entered into willingly"), *cert. denied*, 118 S. Ct. 299 (1997); *Webb* v. *R. Rowland & Co.*, 800 F.2d 803, 807 (8th Cir. 1986) (Arbitration agreements "are not invalid as contracts of adhesion. The use of a standard form contract between two parties of admittedly unequal bargaining power does not invalidate an otherwise valid contractual provision."); *Goodwin*, 970 F. Supp. at 1014-15 (noting form or "adhesion" contracts are "part of the fabric of our society" and serve important economic interests) (citation omitted); *Lackey*, 498 S.E.2d at 902-05 ("Form contracts obviously serve a very useful purpose in commerce"); *Brown*, 921 P.2d at 167 ("Arbitration agreements are not usually regarded as unenforceable contracts of adhesion because . . . the agreement 'bears equally' on the contracting parties and does not limit the obligations or liabilities of any of them, 'but merely substitutes one forum for another'") (citation omitted); *Passage*, 727 P.2d at 1301 ("[M]ere inequality in bargaining power does not render a contract unenforceable, nor are all standardized contracts unenforceable. As a consequence of current commercial realities, form forum clauses will control, absent a strong showing it should be set aside.") (citations omitted). The decision below is in direct conflict with these cases.

In fact, the only decision even arguably supporting the decision below is the California intermediate court's wayward decision in *Patterson* v. *ITT Consumer Financial Corp.*, 14 Cal. App. 4th 1659 (1993), *cert. denied*, 510 U.S. 1176 (1994), on which the court below relied to support the wholesale reversal of the FAA's presumption favoring arbitration provisions. As the dissent below properly concluded, *Patterson* is entirely distinguishable from the present case. App., *infra*, 27a-28a. In any event, *Patterson*

was incorrectly decided, and by unnecessarily turning *Patterson*'s hostility toward arbitration into a broad exception to the FAA for all form contracts, the decision below is even more erroneous and harmful to the clear congressional policy established by the FAA. Indeed, the decision below directly conflicts with post-*Patterson* California case law. *See Armendariz* v. *Foundation Health Psychcare Services, Inc.*, 68 Cal. App. 4th 374, 387-94 (1998) (relying on *Patterson* in part to hold unconscionable a limitation on liability contained in arbitration agreement in "adhesive" employment contract, but nevertheless enforcing remainder of arbitration agreement because of "strong public policy in favor of arbitration"). Whether the decision below stands alone or with *Patterson*, it represents a blatant and irreconcilable conflict with established precedents of this Court and numerous other federal and state courts.

B. The Decision Below Impermissibly Singles Out Arbitration Provisions For Adverse Treatment

1. The FAA makes clear that arbitration provisions may be declared unenforceable only "upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. As this Court repeatedly has made clear, "Congress precluded States from singling out arbitration provisions for suspect status, requiring instead that such provisions be placed 'upon the same footing as other contracts.'" *Doctor's Associates*, 517 U.S. at 687 (citation omitted); *see also, e.g., Allied-Bruce Terminix*, 513 U.S. at 281 (FAA makes unlawful any state policy that "would place arbitration clauses on an unequal 'footing'") (citation omitted); *Perry*, 482 U.S. at 492 n.9 ("A state-law principle that takes its meaning precisely from the fact that a contract to arbitrate is at issue does not comport with this requirement of § 2"). Contrary to this clear command, the decision below singles out arbitration provisions for adverse treatment, at least in the context of consumer credit agreements and other form contracts.

The presumption of unconscionability adopted by the court below for terms contained in "adhesive" contracts in

fact applies only to arbitration agreements. The factors the court relied upon—the disparity of bargaining power and the standardized nature of the agreement—applied to the loan agreement as a whole and were not limited to the arbitration provision. Yet the court below did *not* hold the entire contract between ITT and respondent unenforceable; in fact, the court *enforced* the bulk of the contract. App., *infra*, 7a. Such an arbitration-specific application of state law was expressly forbidden by this Court in *Allied-Bruce Terminix*: "What States may not do is decide that a contract is fair enough to enforce all its basic terms (price, service, credit), but not fair enough to enforce its arbitration clause." 513 U.S. at 281; *see also Hill*, 105 F.3d at 1148 (enforcing arbitration clause in contract shipped with mail-order computer and made effective unless the product was returned within 30 days because "[t]erms inside Gateway's box stand or fall together. If they constitute the parties' contract because the Hills had an opportunity to return the computer after reading them, then all must be enforced").

In Ohio, as in all jurisdictions, contract provisions are not unenforceable merely because they are contained in a form contract, nor does disparate bargaining power alone render contract provisions unenforceable. *See, e.g., Neubrander* v. *Dean Witter Reynolds, Inc.*, 610 N.E.2d 1089, 1091 (Ohio App. 1992) ("[m]ere inequality of bargaining power" is not sufficient to overcome otherwise valid arbitration clauses). That is because form or "adhesion" contracts are "part of the fabric of our society" and provide important benefits, such as efficient and rapid market transactions and increased predictability. 1 Corbin on Contracts § 1.4 (rev. ed. 1993). Such terms become "unconscionable" only when they are unreasonably oppressive. *Lake Ridge Academy* v. *Carney*, 613 N.E.2d 183, 189 (Ohio 1993) (unconscionability requires contract terms that are "unreasonably favorable" to the party with disproportionate bargaining power) (citing *Williams* v. *Walker-Thomas Furniture Co.*, 350 F.2d 445, 449 (D.C. Cir. 1965)). That the court below presumed the arbitration provision unconscionable based on nothing more than its inclusion in a form contract offered to consumers makes clear that the court singled out arbitration clauses for

adverse treatment contrary to this Court's repeated commands. *Cf. Rodriquez de Quijas* v. *Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989) (finding no evidence to support adhesive nature of contract).

Nor did the court below single out the arbitration provision at issue here based on any unique set of facts involved in this case. To the contrary, the only factors the court below relied upon were the standardized nature of the consumer credit agreement and the fact that it was offered on a take-it-or-leave-it basis. There was no allegation of concealment or unfair surprise relating to the arbitration provision, and, as the dissent below noted, there was no dispute that respondent read the contract and understood its terms. App., *infra*, 25a.

Thus, the court below singled out arbitration provisions based solely on its view of the inadequacy of arbitration as an alternative to traditional consumer litigation. This the FAA plainly does not allow. "A court may not, . . . in assessing the rights of litigants to enforce an arbitration agreement, construe that agreement in a manner different from that in which it otherwise construes nonarbitration agreements under state law." *Perry*, 482 U.S. at 492 n.9.

2. Moreover, by singling out arbitration clauses contained in form contracts, the decision below also conflicts with other federal and state court decisions. For example, the Missouri legislature enacted a statute modeled after the FAA that created a presumption in favor of arbitration, "except [for] contracts of insurance and contracts of adhesion." *Webb*, 800 F.2d at 806 (quoting Mo. Ann. Stat. § 435.350 (Vernon Supp. 1986)). Such an arbitration-specific exception, the Eighth Circuit concluded, could not qualify as a ground that "'exist[s] at law or in equity for the revocation of any contract.'" *Id.* (citation omitted). Likewise, in *Hoffman* v. *Cargill, Inc.*, 968 F. Supp. 465 (N.D. Iowa 1997), the court struck down a Nebraska statute that created a presumption in favor of arbitration, but only "if the [arbitration] provision (a) is entered into voluntarily and willingly and (b) is not part of a contract of adhesion." *Id.* at 472 n.8 (quoting Neb. Rev. Stat. § 25-2602 (1996)); *id.*

("[T]he FAA plainly forbids federal courts from applying 'state statutes and decisions which limit arbitration agreements with rules not applicable to other contracts'") (quoting *Collins Radio Co.* v. *Ex-Cell-O Corp.*, 467 F.2d 995, 998 (8th Cir. 1972)); *see also Pate* v. *Melvin Williams Manufactured Homes, Inc.*, 198 B.R. 841 (Bankr. S.D. Ga. 1996) (FAA preempted Georgia's arbitration statute, which excluded arbitration agreements contained in contracts for "the purchase of consumer goods" or "involving consumer transactions") (quoting O.C.G.A. § 9-9-2(c)).

In striking down a similar Massachusetts scheme that restricted arbitration clauses between securities brokerage firms and their customers unless the provisions were expressly negotiated over, were made "conspicuous" in the agreement, and were accompanied by a written explanation of their impact, the First Circuit held that, although "[t]he Commonwealth may well be correct that [pre-dispute arbitration clauses] ought to be arrived at with greater negotiation and disclosure between broker-dealers and customers than currently takes place," such a judgment "is not the Commonwealth's to make, at least not in its current embodiment, for it singles out arbitration in an impermissible way." *Securities Industry Association*, 883 F.2d at 1124. Rather, "states are forbidden from critical scrutiny expressed in a fashion which might mask historic hostility toward arbitration." *Id.* Because Congress has already balanced the desirability of arbitration and "[chose] to emphasize and endorse arbitral efficiencies . . . only Congress, not the states, may create exceptions to it." *Id.* In contrast, the court below created a sweeping exception to the FAA based solely on its view of "the desirability of arbitration," without any reference to Congress's intent.

Each of these state statutes was preempted by the FAA because it singled out arbitration agreements for adverse treatment by eliminating the presumption in favor of arbitration for arbitration provisions contained in "adhesive" or consumer contracts. The decision below imposes, through judicial fiat, the identical burden on arbitration. The FAA prohibits such a decision just as it prevented the legislatures

of Missouri, Nebraska, Georgia, and Massachusetts from imposing the same burden. *Perry*, 482 U.S. 492 n.9 ("Nor may a court rely on the uniqueness of an agreement to arbitrate as a basis for a state-law holding that enforcement would be unconscionable, for this would enable the court to effect what we hold today the state legislature cannot").

The decision below, by failing to conform to federal law, is in direct conflict with these cases. *See also Saturn Distribution Corp.* v. *Williams*, 905 F.2d 719, 724-25 (4th Cir. 1990) (Virginia statute prohibiting mandatory alternative dispute resolution provisions between automobile manufacturers and dealers violated FAA; although statute intended to avoid "potentially adhesive arbitration contracts" between manufacturers and dealers, "Virginia does not always, or even usually presume adhesive contracts to be unenforceable"); *Goodwin*, 970 F. Supp. 1014-15 (Alabama state court rule that purports to apply general unconscionability principles, but which in reality "applies, if not exclusively, at least explicitly and strikingly to disfavor predispute arbitration agreements" violates FAA). This Court's review is warranted to resolve the conflict.

C. The Decision Below Improperly Rests On Generalized Assertions Regarding The "Unreasonableness" Of Arbitration

1. More than a decade ago, this Court declared that "[w]e are well past the time when judicial suspicion of the desirability of arbitration and of the competence of arbitral tribunals inhibited the development of arbitration as an alternative means of dispute resolution." *Mitsubishi*, 473 U.S. at 626-27. Yet the court below, motivated by just such a "suspicion of the desirability of arbitration and the competence of arbitral tribunals," relied entirely on generalized assertions regarding the "unreasonableness" of arbitral fees and costs under applicable NAF rules in concluding that the present arbitration provision was unconscionable.

Notably, the Ohio Supreme Court never inquired into whether respondent was capable of paying the fees in

question, whether she could have received a waiver of such fees on the ground of indigency (as the NAF rules expressly allow), whether she would have been unable to obtain competent counsel for such an arbitration, or even whether the NAF fees were in any way unusual or excessive compared with other arbitration associations. Rather, the court's unconscionability determination relies entirely on its view of the undesirability of arbitration as a mechanism for resolving claims by consumers. The FAA does not allow such a jaundiced view of arbitration. *Cf. Gilmer*, 500 U.S. 30 (claims that arbitration was inadequate to resolve ADEA claims "'res[t] on suspicion of arbitration as a method of weakening the protections afforded in the substantive law to would-be complainants,'" and are "'far out of step with our current strong endorsement of the federal statutes favoring this method of resolving disputes'") (citation omitted); *Seus*, 146 F.3d at 180 (noting Supreme Court has "specifically disavowed, in the context of Title VII claims as well as ADEA claims, the idea that the arbitral process was inferior to the judicial process").

In stark contrast to the decision below, this Court repeatedly has rejected similar generalized assertions regarding the inadequacy of the arbitral forum as inconsistent with the presumption of arbitrability mandated by the FAA. For example, when faced with generalized assertions regarding the inadequacy of an arbitral forum, including allegations of arbitration panel bias, this Court in both *Mitsubishi* and *Gilmer* declared that "'we decline to indulge the presumption that the parties and arbitral body conducting a proceeding will be unable or unwilling to retain competent, conscientious and impartial arbitrators.'" *Gilmer*, 500 U.S. at 30 ((quoting *Mitsubishi*, 473 U.S. at 634)); *see also Mitsubishi*, 473 U.S. at 633 ("[T]he party may attempt to make a showing that would warrant setting aside the forum-selection clause. . . . But absent such a showing . . . there is no basis for assuming the forum inadequate or its selection unfair."). *Cf. Carnival Cruise Lines*, 499 U.S. at 594 (rejecting court of appeals "finding" that "[t]here is evidence . . . to indicate that the [plaintiffs] are physically and financially incapable of pursuing this litigation" in the forum

state as ground for refusing to enforce nonnegotiated forum-selection provision on back of preprinted passenger cruise ticket). By allowing a generalized objection to front-end arbitration fees to thwart the FAA's policy favoring arbitration, the decision below is inconsistent with these cases.

2. The decision below also significantly departs from the approach adopted by other federal and state courts that have addressed the issue. When faced with claims of excessive arbitration fees, several courts have simply held the parties to their bargain and enforced the contract. *See, e.g., Hoffman*, 968 F. Supp. at 474 ("[Plaintiff] also complains about the high fees charged by the NGFA for filings, hearings, and appeals. . . . [He] agreed to abide by NGFA rules in the event the parties proceeded to arbitration. The court may not simply ignore that agreement and release [him] from his obligations under it because he is now dissatisfied with the rules."); *North American Van Lines* v. *Collyer*, 616 So. 2d 177, 178-79 (Fla. App. 1993) ("public policy favor[ing] arbitration" and "well-established contract law" requires enforcing arbitration agreement despite arbitration fees many times larger than comparable court costs); *id.* at 180 (Griffin, J., concurring) (warning consumers that "[i]t will not matter to a court that when the consumer signed the form agreement . . . he or she was unaware of the front-end fee requirement . . . or that these fees can be in the thousands of dollars. Nor will it matter that the consumer is unable to pay the fee. . . . [T]he arbitration agreement will be enforced according to its terms"); *A.P. Brown Co.* v. *Superior Court*, 490 P.2d 867 (Ariz. App. 1971) (enforcing arbitration agreement despite $1,100 initiation fee).

Other courts have emphasized that absent a specific, factual showing that the individual will be denied access to any forum, the arbitration provision must be enforced. *See, e.g., Rollins, Inc.* v. *Foster*, 991 F. Supp. 1426, 1438 (M.D. Ala. 1998) (enforcing arbitration because although plaintiff asserted that arbitration fees of several thousand dollars denied her access to any forum, she failed to provide

sufficient evidence of her financial condition, the arbitrator's fees, and her inability to retain counsel to overcome presumption in favor of arbitration).

Contrary to the decision below, however, none of these courts have allowed a generalized objection to front-end arbitration fees to overcome the FAA's policy favoring arbitration. This Court's review is necessary to resolve the resulting conflict.

D. Review Is Necessary To Preserve The Validity Of Millions Of Arbitration Agreements Nationwide

The Supreme Court of Ohio's stunning decision poses a significant threat to the proper enforcement of the FAA and this Court's case law. By eliminating the federal presumption favoring arbitration—and indeed imposing a hostile presumption—for all arbitration provisions contained in consumer credit agreements or other form contracts, the decision below has introduced an entirely new strain of the antiquated hostility toward arbitration that the FAA was enacted to combat. Moreover, this new strain is particularly virulent, both because of its breadth, threatening as it does to eviscerate the FAA of its impact on all standard "form" contracts, and because it shrouds its contempt for arbitration with purportedly general principles of unconscionability.

1. The decision below effectively repeals the FAA for broad categories of arbitration agreements. As the dissent below correctly observed, "the breadth of [the] decision" could "work[] toward the wholesale invalidation of arbitration clauses in consumer transactions." App., *infra*, 27a; *see also id.* at 24a (opinion below "could potentially invalidate a large percentage of arbitration agreements in consumer transactions"). By so doing, the decision below undermines the future viability of arbitration in Ohio, and in every other State that may be tempted to embrace Ohio's hostility to arbitration.

Tens of thousands of form contracts calling for arbitration of disputes are executed every day in the United States. Such agreements are commonplace in the purchase

of securities, in employment, and in franchising. In industries such as mortgage and consumer lending and insurance, such contracts are essential. Without the use of standardized time-tested agreements, repeated consumer loans and insurance transactions simply would not be possible. Moreover, the availability of "the simplicity, informality, and expedition of arbitration" (*Mitsubishi*, 473 U.S. at 628) encourages such transactions, and lowers the cost of loans and insurance for consumers. *See Securities Industry Association*, 883 F.2d at 1124 ("Arbitration is a positive good in the eyes of courts and Congress not just because it relieves crowded calendars, but because it relieves an often unnecessary elaboration of social practices"). The Ohio court's antipathy toward arbitration agreements strikes a devastating blow to a form of alternative dispute resolution favored by Congress, and eliminates the efficiencies provided by form contracts.[1]

In addition, the decision below only encourages prolonged and expensive litigation on the collateral issue of arbitrability, contrary to the entire purpose of arbitration. As this Court has warned, "[c]ontracts to arbitrate are not to be avoided by allowing one party to ignore the contract and resort to the courts. Such a course could lead to prolonged litigation, one of the very risks the parties, by contracting for arbitration, sought to eliminate." *Southland Corp.*, 465 U.S. at 7.

Moreover, all of the troubling consequences of the decision below—frustrating the purposes of the FAA, creating significant conflicts in the law, and threatening the validity of millions of current arbitration agreements—are heightened by the additional lamentable fact that the decision will inevitably lead to unwarranted forum shopping. This Court has recognized the problem of forum shopping in this

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[1] Because this case involves an arbitration provision in a commercial contract, rather than a collective bargaining agreement, this Court's recent decision in *Wright* v. *Universal Maritime Service Corp.*, 119 S. Ct. 91 (1998), is not implicated.

context and concluded that "[w]e are unwilling to attribute to Congress the intent, in drawing on the comprehensive powers of the Commerce Clause, to create a right to enforce an arbitration contract and yet make the right dependent for its enforcement on the particular forum in which it is asserted." *Southland Corp.*, 465 U.S. at 15. Such a result "would frustrate congressional intent to place '[a]n arbitration agreement . . . upon the same footing as other contracts, where it belongs.'" *Id.* (citation omitted).

2. This Court has made clear that certiorari review is appropriate where, as here, "a state court of last resort has decided an important federal question in a way that conflicts with the decisions of another state court of last resort or of a United States court of appeals . . . or has decided an important federal question in a way that conflicts with relevant decisions of this Court." *See* this Court's Rule 10. Each of these standards is readily satisfied by the decision below. The Ohio Supreme Court has adopted a rule of law that undermines the important federal policy favoring arbitration expressed in the FAA and is in direct conflict with numerous decisions of this Court and other federal and state courts.

Unfortunately, the decision below is indicative of a broader trend among some courts to devise novel ways of resurrecting the old hostility towards arbitration that the FAA and this Court's precedents forbid. *See, e.g., Craft* v. *Campbell Soup Co.*, 161 F.3d 1199, 1205-06 (9th Cir. 1998) (holding, contrary to the great weight of circuit authority, that the FAA does not apply to labor or employment contracts); *Duffield* v. *Robertson Stephens & Co.*, 144 F.3d 1182, 1200 (9th Cir.) (holding Title VII claims non-arbitrable), *cert. denied*, 119 U.S. 445 (1998); *Arnold* v. *United Companies Lending Corp.*, __ S.E.2d __, 1998 WL 865105 (W. Va. Dec. 11, 1998) (holding unconscionable an arbitration provision contained in consumer loan contract because it required "a substantial waiver of the borrower's rights, including access to the courts, while preserving the lender's right to a judicial forum"); *Brower* v. *Gateway 2000, Inc.*, 246 A.2d 246, 252-53 (N.Y. App. Div. 1998)

(finding arbitration fees in consumer contract unconscionable). This Court's review is necessary to reverse this disturbing trend.

As recent decisions such as *Doctor's Associates* and *Allied-Bruce Terminix* attest, this Court has been vigilant in ensuring that state courts do not unduly interfere with the federal policy favoring arbitration. Indeed, in *Doctor's Associates*, this Court granted certiorari and overturned a unique Montana law that imposed procedural barriers to arbitration. By rendering the FAA nugatory in all cases involving standardized form contracts, the decision below poses a much greater threat than did Montana's procedural hurdles to the important federal policies embodied in the FAA and this Court's precedent. This Court's review is required to restore those important federal policies, and to preserve the viability of millions of arbitration agreements threatened by the decision below.

II. The Decision Below Exacerbates The Conflicts And Confusion Among Lower Federal And State Courts Regarding Application Of The *BMW* Standards

Review of the decision below is also warranted because the Ohio Supreme Court blatantly disregarded this Court's watershed decision in *BMW* v. *Gore*, 517 U.S. 559 (1996).

In *BMW*, the Court held that constitutional due process requires courts to review punitive damages awards for excessiveness. "Elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose." *Id.* at 574. The Court identified three "guideposts" for courts to use in determining whether a punitive damages award is unconstitutionally excessive: (1) the degree of reprehensibility of the defendant's conduct, (2) the ratio between the punitive damages award and the actual harm inflicted on the plaintiff, and (3) the statutory penalties for similar misconduct. *Id.* at 575.

The Ohio Supreme Court ignored all of these guideposts in affirming the award against ITT. Rather, it sustained the significant punishment imposed on ITT solely because it concluded that "there is ample evidence in the record that ITT engaged in wrongful conduct sufficient to merit an award of punitive damages." But as this Court made clear in *BMW*, "[t]hat conduct is sufficiently reprehensible to give rise to tort liability, and even a modest award of exemplary damages, does not establish the high degree of culpability that warrants a substantial punitive damages award." 517 U.S. at 580. Indeed, not only did the court below fail to consider the degree of reprehensibility of ITT's conduct, as *BMW* requires, it disregarded entirely the other two *BMW* guideposts—the ratio between punitive and compensatory damages, and other available sanctions for similar conduct.

All three *BMW* factors make clear that the $1.5 million dollar award in this case is unconstitutionally excessive. The degree of reprehensibility of ITT's conduct cannot support a punitive damages award of $1.5 million. The Ohio Supreme Court's affirmance of the award was based essentially on its finding that ITT employees were aware that the contractor, Blair, had financial troubles and often had dissatisfied customers. Based on this evidence alone, the court concluded that the mere making of the loan agreements by ITT constituted fraud against respondent. App., *infra*, 17a. Yet, the court also upheld the trial court's findings that Blair was not operating as an agent of ITT, that ITT had no fiduciary relationship with respondent, and that ITT itself made no material misrepresentations, *id.* at 13a-18a, and the court specifically disavowed the trial court's finding of a duty to disclose information regarding Blair's financial difficulty, *id.* at 17a-18a. Prior to the decision below, no court in Ohio (or any other jurisdiction) had recognized such a broad theory of lender liability. Thus, at the time ITT's conduct occurred, it was not even clear that making the loan in question was wrongful, much less that it was sufficiently reprehensible to support a punitive damages award of $1.5 million. *See BMW*, 517 U.S. 584 ("[T]he omission of a material fact may be less reprehensible than a deliberate false statement, *particularly where there is a good faith basis for*

believing that no duty to disclose exists") (emphasis added). Moreover, the retroactive nature of the award raises further constitutional concerns. *Landgraf* v. *USI Film Products, Inc.*, 511 U.S. 244, 281 (1994) ("Retroactive imposition of punitive damages would raise a serious constitutional question").

The remaining *BMW* factors confirm the unconstitutional magnitude of the punitive damages award in this case. The 100-to-1 ratio between the punitive and compensatory damages imposed on ITT is startling and strongly supports the conclusion that the award below is excessive. Indeed, the decision below is in direct conflict with the Tenth Circuit's holding in *Continental Trend Resources, Inc.* v. *OXY USA, Inc.*, 101 F.3d 634, 639 (10th Cir. 1996), *cert. denied*, 117 S. Ct. 1846 (1997), that "in economic injury cases if the damages are significant and the injury not hard to detect, the ratio of punitive damages to the harm generally cannot exceed a ten to one ratio."

In addition, the award below greatly exceeds the amount recoverable under similar state-law remedies. In addition to her common law claims, respondent alleged that ITT's failure to disclose the contractor's financial troubles violated Ohio's Consumer Sales Practices Act, R.C. § 1345.01 *et seq.*, and Home Solicitation Sales Act, R.C. § 1345.21 *et seq.* The jury found liability under both of these statutes, and the court of appeals affirmed. App., *infra*, 18a-20a. Both of these statutes, however, cap penalties for violations at three times the compensatory damages. R.C. § 1345.09(B). That the jury's punitive damages award exceeded the potential penalty under these comparable statutory provisions by more than thirty times further supports the conclusion that the award below was unconstitutionally excessive.

Unfortunately, the decision below is symptomatic of the way in which some lower courts have routinely disregarded the *BMW* standards. *See, e.g., Jordan* v. *Shaw Industries, Inc.*, 1997 WL 734029 (4th Cir. Nov. 26, 1997) (affirming $1,222,250 award of punitive damages to several defendants whose compensatory awards ranged from $2,500 to $50,750, and noting that while "the ratios of punitive to compensatory

damages here approached the 500-to-1 ratio that rais[ed] a suspicious eyebrow in *BMW* . . . far more disparate punitive damages awards have been countenanced even in the wake of *BMW*"); *Wilson* v. *IBP, Inc.*, 558 N.W.2d 132 (Iowa 1996) (treating 500-to-1 ratio between $2 million punitive damages award and $4,000 compensatory award as of little significance), *cert. denied*, 118 S. Ct. 52 (1997); *BMW of North America, Inc.* v. *Gore*, 701 So. 2d 507, 514 (Ala. 1997) (on remand from Supreme Court, Alabama court disregarded statutory penalty applicable to BMW's alleged misconduct on ground that it was too small); *Jacque* v. *Steenberg Homes, Inc.*, 563 N.W.2d 154 (Wis. 1997) (upholding $100,000 award of punitive damages in trespass case, even though plaintiff awarded only $1 in nominal damages and statutory penalty for trespass was capped at $1,000).

While many lower courts have been more solicitous of this Court's decision in *BMW*, these cases are typical of many in which courts have paid only lip-service to *BMW*. This confusion, coupled with the Ohio Supreme Court's complete disregard of *BMW*'s core teachings, makes clear that further review is essential to ensure that the Court's decision in *BMW* has meaningful effect.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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February 2, 1998